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Supreme Court of the United States.

October Term, 1923.

No. [redacted]331

JAMES C. DAVIS,
PETITIONER,

v.

L. L. COHEN & COMPANY, INC.,
RESPONDENT.

Petition for Writ of Certiorari and Brief in Support Thereof.

[illegible] & [illegible] LAW PRINTERS, [illegible]

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Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 899.

JAMES C. DAVIS,
PETITIONER,

v.

L. L. COHEN & COMPANY, INC.,
RESPONDENT.

NOTICE.

To LOUIS SWIG, ESQUIRE,
Counsel for Respondent.

Sir: Please take notice that on Monday, the 28th day of April, 1924, upon the opening of the Court, or as soon thereafter as counsel can be heard, the foregoing petition and brief, together with a certified copy of the entire transcript of the record of the case, will be presented and submitted to the Supreme Court of the United States, in its court room in the Capitol at Washington, D.C., in pursuance of its rules, in such cases made and provided.

Dated this 22d day of March, 1924.

ARTHUR W. BLACKMAN,
Counsel for Petitioner.

Due service of the foregoing notice, together with a copy of the petition for a writ of certiorari, and brief in support thereof, is hereby acknowledged.

LOUIS SWIG,
Counsel for Respondent.

Taunton, Mass., March 25, 1924.

Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 899.

JAMES C. DAVIS, AGENT,
PETITIONER,

v.

L. L. COHEN & COMPANY, INC.,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF MASSACHUSETTS.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, James C. Davis, Agent, respectfully presents to this Court this his petition for a writ of certiorari addressed to the Superior Court of the Commonwealth of Massachusetts, commanding such Court and the clerk thereof to certify to this Court the record and proceedings of the case in said Court, wherein your petitioner was defendant and the respondent, L. L. Cohen & Company, Inc., a corporation of the Commonwealth of Massachusetts, was plaintiff, together with the opinion therein of the Supreme Judicial Court for the Commonwealth of Massachusetts, for the review and determination of said cause by this Court.

In this behalf, your petitioner states the following facts:

This action was brought by the respondent in said Superior Court for the County of Bristol to recover for damage to a carload of scrap iron shipped in interstate commerce by the respondent in December, 1918. Your petitioner was, on March 28, 1921, appointed by the President of the United States the agent under the Transportation Act.

The respondent began its action by writ dated January 9, 1920, against The New York, New Haven and Hartford Railroad Company, a Massachusetts corporation and a carrier in interstate commerce, whose railroad was taken over and operated by the Federal Government in accordance with the Proclamation of the President of the United States dated December 26, 1917.

On September 21, 1922, the respondent herein moved that it be allowed to substitute as party defendant, in place of The New York, New Haven and Hartford Railroad Company, your petitioner as alleged agent, which motion was allowed. Thereafter, on October 7, 1922, an order of notice was issued from said Court directing the plaintiff below, respondent herein, to give notice to your petitioner of the pendency of said action and requiring your petitioner to appear and answer on the first Monday of November, 1922. Said order of notice was served upon a division superintendent of said The New York, New Haven and Hartford Railroad Company on October 16, 1922. Service upon said division superintendent would have been a good service in an action against said The New York, New Haven and Hartford Railroad Company.

Thereafter in due course your petitioner appeared specially by counsel and filed a motion to dismiss, alleging that the Court had no jurisdiction over your petitioner. Your petitioner's motion to dismiss set forth that the Court was without jurisdiction to entertain the action against your petitioner, the defendant below; that the issuance and service of the writ were null and void because in violation of and in conflict with section 206 of the Act of Congress of February 28, 1920, known as the Transportation Act; that the proceeding against your petitioner was not instituted within the time prescribed in said Transportation Act; that said proceeding was not instituted in the manner provided by said Transportation Act; that no service had been made upon your petitioner as required by the Transportation Act; that Massachusetts laws, under the authority of which your petitioner was summoned in as party defendant in this action, if held to authorize such proceedings, were repugnant to the provisions of the Transportation Act, and, therefore, null and void; and prayed that the service of the writ be set aside and the action as against your petitioner be dismissed.

Your petitioner's said motion to dismiss was, on January 2, 1923, overruled, and said action of the Court thereon became the subject of your petitioner's bill of exceptions to the Supreme Judicial Court for the Commonwealth of Massachusetts.

After your petitioner's motion to dismiss was overruled, your petitioner was required to answer, and in due course did so, again objecting to the jurisdiction of the Court over him, and among other defenses alleging that the plaintiff's alleged cause of action arose in connection with a shipment of freight in inter-

state commerce in December, 1918; that a reasonable time for delivery of said shipment was not later than two months thereafter; that said shipment of freight was made under and in pursuance with the terms and conditions of a bill of lading, one of the conditions of which required that suits for loss, damage, or delay must be brought not later than two years and one day after the lapse of a reasonable time for delivery; and that the plaintiff's proceeding against your petitioner was not begun within the time so prescribed by the terms of the bill of lading.

The action was subsequently tried upon the merits, and at the close of the evidence the trial court directed a verdict for your petitioner, the defendant therein, and reported the case on request of the parties to the Supreme Judicial Court for the Commonwealth of Massachusetts. Said report of the case was argued before the said Court together with your petitioner's exceptions raising the question of jurisdiction. The said Supreme Judicial Court of Massachusetts reversed the decision of the trial court on the merits, sustained the order of the trial court overruling your petitioner's motion to dismiss, and directed the Superior Court of the Commonwealth of Massachusetts to enter judgment for the plaintiff below, the respondent herein.

The reasons relied on for the issuance of said writ and upon which your petitioner believes the writ ought to be issued are as follows:

I.

The Supreme Judicial Court for Massachusetts, in holding that the representative of the Federal Rail-

road Administration can be made a party by substitution in any case where the action originally was wrongly brought against the railroad corporation, is permitting a course of procedure contrary to the terms of General Order 50 and General Order 50-A of the United States Railroad Administration.

II.

The Supreme Judicial Court for Massachusetts, in permitting the representative of the Government to be made a party by substitution in an action originally wrongly brought against the railroad corporation, was deciding a matter of substance and not of procedure, and was applying the particular policy of the Commonwealth of Massachusetts in relation to a Federal question. This is contrary to the policy of Congress as expressed in the Transportation Act.

III.

In holding that, in an action against the Government, the representative of the Government may be made a party by substitution where the action originally was wrongly brought against the railroad corporation the decision reads into the consent given to sue the Government a permission to proceed in a way not authorized by the consent given.

IV.

The decision holds that substitution may not only be had, but that it may be had later than two years after the end of Government control. This is in conflict with the Transportation Act.

V.

The decision holds that substitution may be had at a time more than two years and one day after a reasonable time for delivery of the property had elapsed. This holding is in conflict with the uniform bill of lading authorized by the Interstate Commerce Commission and used by the carriers, and is, therefore, in conflict with the Act to Regulate Commerce.

VI.

In holding that the representative of the Government can be made a party by substitution in an action originally brought against the railroad company at a time more than two years after a reasonable time for delivery of the property and at a time more than two years after the passage of the Transportation Act, the Supreme Judicial Court of Massachusetts holds that such substitution is not the commencement of a new action. This is in conflict with the Transportation Act and also with principles of law enunciated by this Court.

VII.

In holding that substitution may be had later than two years after the end of Government control, the Supreme Judicial Court of Massachusetts holds that section 206 (*a*) of the Transportation Act purports to deal only with the time within which actions may be commenced where the cause of action thereof arose during Federal control and no action whatever was brought during that period. This is in conflict with the Transportation Act, which applies to any and all proceedings instituted thereafter against the Government.

VIII.

In deciding that the representative of the Government can be made a party by substitution at a time later than two years after the end of Federal control, the Supreme Judicial Court holds that the service as made was lawful and valid. This is in conflict with the Transportation Act.

IX.

The decision of the Supreme Judicial Court of Massachusetts is in conflict with other decisions of State Courts and with decisions of the lower Federal Courts and is believed to be in conflict with recent decisions of this Court. This case is a test case, the determination of which by this Court will govern the conduct of parties in many other cases pending in the Commonwealth of Massachusetts and elsewhere.

ARTHUR W. BLACKMAN,
Counsel for JAMES C. DAVIS, Agent.

STATE OF MASSACHUSETTS, COUNTY OF BRISTOL, ss.

ARTHUR W. BLACKMAN, being first duly sworn, on oath deposes and says that he is the counsel for petitioner, James C. Davis, Agent; that he has read the foregoing annexed petition and knows well the contents thereof; that he has also carefully read and studied a duly certified copy of the transcript of record which accompanies the petition herein, being the transcript of record in the case at bar; that the matters in said petition are in the judgment of this affiant duly supported in and by said transcript of record, and that he knows of the above proceedings had, and that the acts

in said petition herein stated are true to the best of his knowledge and belief.

Subscribed and sworn to before me this 28th day of March, 1924.

EDWARD C. BARKER,
[seal] Notary Public in and for
the State of Massachusetts.
My commission expires January 19, 1928.

I do hereby certify that I have carefully examined the foregoing petition for a writ of certiorari, and that the allegations thereof are true, as I verily believe, and in my opinion the petition is well founded and the case is one in which the prayer of the petition should be granted by this Court.

ARTHUR W. BLACKMAN,
Counsel for Petitioner.

Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 899.

JAMES C. DAVIS, AGENT,
PETITIONER,
v.
L. L. COHEN & COMPANY, INC.,
RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The petition for a writ of certiorari accompanies a writ of error in the case of *James C. Davis, Agent, Plaintiff in Error,* v. *L. L. Cohen & Company, Inc., Defendant in Error,* and is filed for the purpose of obtaining a review in the event that this Court should hold that the case was not properly before the Court on the writ of error.

A.

AUTHORITY FOR THE ISSUANCE OF THE WRIT.

A Federal question is presented because this case involves the right of the respondent, plaintiff below, to recover for damage to an interstate shipment, which moved during the period of Federal control of carriers. The petitioner's motion to dismiss objected to the Court's jurisdiction over him because the proceedings were in violation of the Act of Congress, February 28, 1920, known as the Transportation Act,

and the petitioner's answer thereafter filed, in addition pleaded in bar to the action the requirement in the bill of lading that suit should be brought within two years and one day from delivery of the shipment.

If this Court should hold that the cause is not properly before the Court on the writ of error, then a review may be had on a writ of certiorari on the ground that the decision of the State Court was against the Federal rights claimed by the petitioner under the Interstate Commerce Act and under the Transportation Act, and the petition may be allowed under section 237 of the Judicial Code.

B.

The State Court Erred in Holding that the Respondent could Recover.

(1) *The substitution of the petitioner as party defendant was the beginning of a new cause of action.*

The so-called amendment in the proceedings below was not a mere expansion or amplification of what was alleged in support of the cause of action already asserted, nor did it relate back to the commencement of the action.

> *Atlantic Coast Line Railroad Company* v. *Burnette*, 239 U.S. 199, 201.
>
> *Seaboard Air Line Railway* v. *Renn*, 241 U.S. 290, 293.
>
> *Union Pacific Railroad Company* v. *Wyler*, 154 U.S. 285.

As respondent's right to sue was given by Act of Congress, and the amendment brought in a new party, the amendment in the Court below was both a depar-

ture from law to law and the assertion of a new cause of action.

Union Pacific Railroad Company v. *Wyler*, 154 U.S. 285.
United States v. *McCord*, 233 U.S. 157.

(2) *The running of the limitation in the bill of lading was not arrested as to the petitioner.*

As the petitioner did not become a defendant before October, 1922, and as the petitioner represents the Federal Government and not the original corporate defendant, the petitioner may set up the bill-of-lading provision requiring suit to be brought within two years and one day after delivery of the property.

Union Pacific Railroad Company v. *Wyler*, 154 U.S. 285.
Alexander v. *Pendleton*, 8 Cranch, 462.
Sicard v. *Davis*, 6 Peters, 124.
United States v. *Dalcour*, 203 U.S. 408.

(3) *There is no authority in Federal law for the substitution.*

General Order 50 of the Director General, dated October 28, 1918 (U.S. R.R. Administration Bulletin No. 4, p. 334), was in effect at the time the respondent's action was begun, and was mandatory. The respondent's original proceeding was therefore improperly brought and could avail it nothing.

Missouri Pacific Railroad Company v. *Ault*, 256 U.S. 554.

The bringing in of the petitioner by amendment to an action erroneously brought was not permissible where the right to maintain the action against the

Federal Government is a right granted by the sovereign.

Rock Island, Arkansas & Louisiana Railroad Company v. *United States*, 254 U.S. 141, 143.
United States v. *McCord*, 233 U.S. 157.

In the latter case, which involved the statute giving creditors of a contractor for the United States the right to sue in the name of the United States upon the contractor's bond, and authorized the intervention of other creditors, this Court said:

> "These rights to intervene and to file a claim, conferred by the statute, presuppose an action duly brought under its terms. In this case the cause of action had not accrued to the creditors who undertook to bring the suit originally. The intervention could not cure this vice in the original suit. Nor do we think that the intervention could be treated as an original suit."

Not only is there no authority in the Transportation Act for the substitution of the agent in cases erroneously brought, but also the amendment to the Transportation Act, passed March 3, 1923, known as the Winslow Act, expressly authorized substitution of the Agent or Director General only in actions properly commenced. This failure of Congress to authorize substitution in cases erroneously brought shows that all along it has been the intent of Congress not to permit substitution in such situations.

Respectfully submitted,
ARTHUR W. BLACKMAN,
Counsel for
JAMES C. DAVIS, AGENT, Petitioner.

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October Term, 1924.

No. 331.

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PLAINTIFF IN ERROR AND PETITIONER,

v.

L. L. COHEN & COMPANY, INC.,
DEFENDANT IN ERROR AND RESPONDENT.

ON WRIT OF ERROR AND PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF BRISTOL COUNTY OF THE STATE OF MASSACHUSETTS.

Brief for Plaintiff in Error and Petitioner.

ARTHUR W. BLACKMAN,
Counsel for James C. Davis, Agent,
Plaintiff in Error,
Petitioner for Certiorari.

Davis v. Ind. Commission

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON

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Respectfully submitted,

ARTHUR W. BLACKMAN,

Counsel for

JAMES C. DAVIS, AGENT, Petitioner.